

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 222

Docket No. PH-0752-08-0095-I-1

Lillie M. Coley,

Appellant,

v.

Department of Transportation,

Agency.

November 2, 2009

Edward H. Passman, Esquire, Washington, D.C., for the appellant.

Jay M. Fox, Esquire, Atlantic City Airport, New Jersey, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a document requesting review of the initial decision that affirmed her removal. For the reasons set forth below, we DISMISS the attempted petition for review for lack of jurisdiction.

BACKGROUND

¶2 The agency removed the appellant on October 29, 2007. Initial Appeal File (IAF), Tab 4, Subtab 4b. The appellant filed a Board appeal, raising claims of discrimination and retaliation for protected equal employment opportunity activity. IAF, Tab 1 at 2. On July 5, 2008, the administrative judge issued an initial decision affirming the appellant's removal. IAF, Tab 15 (ID) at 1, 18. The

administrative judge accurately notified the appellant of her various options for seeking review of the initial decision, including the various procedures and time limits for doing so. She informed the appellant of how to seek review with the Board, the Equal Employment Opportunity Commission (EEOC), the appropriate United States district court, and the United States Court of Appeals for the Federal Circuit. ID at 18-21.

¶3 The appellant chose not to file a petition for review with the Board, and instead allowed the initial decision to become final. Pursuant to the administrative judge's instructions, the appellant filed a timely petition with the EEOC, requesting review of the Board's findings on her discrimination and reprisal claims. EEO File, Tab 1 at 2. The EEOC issued a decision concurring with the Board's decision. *Coley v. Peters*, EEOC Petition No. 0320080108, 2008 WL 4773218. Pursuant to the appeal rights notice in the EEOC decision, the appellant filed a civil action in the United States District Court for the District of New Jersey, requesting review of the Board's decision in its entirety. EEO File, Tab 3 at 2-3; Petition for Review File (PFRF), Tab 3 at 18-44; *Coley v. LaHood*, Civil Action No. 08CV5802. The agency has made an uncontested assertion that the district court case is still pending. PFRF, Tab 3 at 6-7.

¶4 On August 20, 2009, the appellant filed a document with the Board, requesting review of the initial decision based on alleged new and material evidence. PFRF, Tab 1 at 1-7, 14-19. The appellant filed a motion and supporting affidavit for the Board to waive its petition for review filing deadline. *Id.* at 8-12. The agency has filed a response, arguing, among other things, that the Board lacks jurisdiction to consider the appellant's filings because she has chosen an alternative avenue for review of the initial decision. PFRF, Tab 3 at 5-9.

ANALYSIS

¶5 For the following reasons, the Board lacks jurisdiction to consider the appellant's attempted petition for review. The instant appeal is similar to *Williams v. U.S. Postal Service*, [967 F.2d 577](#) (Fed. Cir. 1992). In *Williams*, the appellant filed a Board appeal of his removal and raised a discrimination claim. 967 F.2d at 578. The administrative judge affirmed the appellant's removal, and the appellant allowed the initial decision to become final. *Id.* The appellant petitioned the EEOC for review, and the EEOC concurred with the Board's decision. *Id.* The appellant then filed a civil action in federal district court, which the court dismissed as untimely. *Id.* The appellant then submitted another filing to the Board, which the Board treated as an untimely petition for review of the initial decision. *Id.* The Board dismissed the petition as untimely filed with no good cause shown for the delay. *Id.* The appellant then appealed to the United States Court of Appeals for the Federal Circuit.

¶6 The court affirmed the dismissal, but on other grounds. It found that when the initial decision became final and the appellant petitioned the EEOC for review, the appellant had no further right to petition for review with the Board. At that point, the appellant's attempts to show good cause for the "untimeliness" of his filing were irrelevant. *Id.* at 578-79. The court stated:

[W]hen the Board received [the appellant's] document . . . it was not a petition for review of an initial decision, untimely or otherwise. It instead requested review of a final Board decision on which all permissible appeals had already been exhausted. The Board properly dismissed this petition, but on the wrong grounds. The Board simply lacked jurisdiction to reopen a final and fully adjudicated decision.

Id. at 579 (citation omitted). The Board is bound to follow this precedential Federal Circuit decision. See *Schibik v. Department of Veterans Affairs*, [98 M.S.P.R. 591](#), ¶ 8 (2005); see also *Lynch v. Federal Deposit Insurance Corporation*, [60 M.S.P.R. 447](#), 448-50 (1994) (following the court's holding in *Williams* under similar circumstances). Although the alleged new and material evidence that the appellant submits on review might have provided a basis for the

Board to waive its petition for review filing deadline if the appellant had not sought review in another forum, PFRF, Tab 1 at 1-7, 14-19; *see Bruton v. Department of Veterans Affairs*, [109 M.S.P.R. 271](#), ¶¶ 9-12 (2008), the appellant's actions of seeking review in another forum preclude the Board from considering the evidence at this time, *see Williams*, 967 F.2d at 578-79; *Lynch*, 60 M.S.P.R. at 448-50.

¶7 The Board is a creature of statute, and its jurisdiction is strictly limited to that provided by law, rule, or regulation. [5 U.S.C. §§ 1204](#)(a)(1), 7701(a); *Thompson v. Merit Systems Protection Board*, [421 F.3d 1336](#), 1337 (Fed. Cir. 2005). Congress has provided various avenues through which an appellant may seek review of an administrative judge's initial decision. *See* [5 U.S.C. §§ 7701](#)(e)(1), 7702(b), 7703(a)-(b). In this case, the appellant was fully informed of her options for seeking review, and she selected the option provided in [5 U.S.C. § 7702](#)(b), i.e., filing a petition with the EEOC. ID at 18-21; EEO File, Tab 1 at 2. At that point, the appellant chose to forego her opportunity to seek Board review in favor of a different forum, and the Board was divested of jurisdiction over the matter.* *See Williams*, 967 F.2d at 578; *Lynch*, 60 M.S.P.R. at 449.

¶8 We also decline to consider the appellant's submission as a request to reopen. Although the Board has some limited authority to reopen and reconsider appeals in which a reviewing court has issued a final decision, *see Mitchell v. Department of Commerce*, [100 M.S.P.R. 415](#), ¶ 9 (2005), *review dismissed*, 175 F. App'x 340 (Fed. Cir. 2006), there is no indication that the district court has issued a final decision here, *see Anderson v. Department of Transportation*, [46 M.S.P.R. 341](#), 350 n.29 (1990) (the pendency of judicial review deprives the Board of jurisdiction to consider a request for reopening; such a request must

* If the EEOC had not concurred with the Board's decision, the appellant's case would have been subject to further Board involvement under [5 U.S.C. § 7702](#)(c)-(d).

await the court's decision on review), *aff'd*, 949 F.2d 404 (Fed. Cir. 1991) (Table).

¶9 Accordingly, the Board lacks the authority to consider the appellant's August 20, 2009 filings either as a petition for review or as a request to reopen and reconsider the appeal. Because the Board lacks jurisdiction for the reasons set forth above, we need not address the agency's other arguments on the jurisdictional issue. PFRF, Tab 3.

ORDER

¶10 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.